Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-18 (2)

IN THE

Supreme Court of the United States

October Term, 1985

PITTSBURGH TERMINAL CORPORATION,
Petitioner

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, W. JAMES PRICE, ALONZO G. DECKER, JR., JAMES PARKER NOLAN, FREDERICK DEANE, JR., JAMES L. O'KEEFE, GREGORY S. DEVINE, FAY A. LeFEVRE, JOHN K. STEVENSON, HAYS T. WATKINS and HOWARD E. SIMPSON; THE CHESAPEAKE AND OHIO RAILROAD and THE CHESSIE SYSTEM, INC.,
Respondents

and

MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER,
Petitioners,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, W. JAMES PRICE, ALONZO G. DECKER, JR., JAMES PARKER NOLAN, FREDERICK DEANE, JR., JAMES L. O'KEEFE, GREGORY S. DEVINE, FAY A. LeFEVRE, JOHN K. STEVENSON, HAYS T. WATKINS and HOWARD E. SIMPSON; THE CHESAPEAKE AND OHIO RAILROAD and THE CHESSIE SYSTEM, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD T. WENTLEY, ESQ.
ANTHONY J. BASINSKI, ESQ.
JOSEPH W. KLEIN, ESQ.
REED SMITH SHAW & MCCLAY
747 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 288-3131

Attorneys for Respondent-Defendants

HERBICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233-2182

BEST AVAILABLE COPY

30 pp

QUESTIONS PRESENTED

I. Did the Court of Appeals properly interpret the terms of a stipulation extending relief to persons who were not parties to these lawsuits?

II. Did the Court of Appeals properly exercise its discretion in denying the plaintiffs prejudgment interest?

LISTING UNDER SUPREME COURT RULE 28.1

The CSX Corporation owns 100% of The Chesapeake and Ohio Railway Company and has the following subsidiaries and affiliates which come within Rule 28.1:

a. Mid-Allegheny Corporation;

b. New Gauley Coal Corporation; and

c. Littleton Fuel Company.

The Baltimore and Ohio Railroad Company has the following subsidiaries and affiliates which come within Rule 28.1:

a. The Baltimore and Philadelphia Railroad Company;

b. Cleveland Terminal & Valley Railroad Company;

c. Dayton and Michigan Railroad Company;

d. Dayton and Union Railroad Company;

e. The Home Avenue Railroad Company; and

f. Allegheny and Western Railway Company.

The Chesapeake and Ohio Railway Company has the following subsidiaries and affiliates which come within Rule 28.1:

a. Fruit Growers Express Company;

b. Richmond-Washington Company;

c. Richmond, Fredericksburg & Potomac Railroad Company; and

d. The Baltimore and Cumberland Valley Railroad Extension Company.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Listing Under Supreme Court Rule 28.1	ii
Table of Contents	iii
Table of Authorities	iii
Statement of the Case	1
I. The Agreement	2
II. The Offer of Judgment	3
Summary of Argument	6
Reasons for Denying the Writ	7
I. There Is No Conflict Presented In This Case On The "Travel" Issue	7
II. There Is No Conflict Presented In This Case On The Issue Of Prejudgment Interest	11
Conclusion	16
Suplemental Appendix	1a

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	9
Bersch v. Drexel Firestone, Inc, 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975)	12
Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967)	15
Blau v. Lehman, 368 U.S. 403 (1962)	13, 15
Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), rev'd, Marek v. Chesny—U.S.—, 105 S. Ct. 3012 (1985)	14
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	9,11
Feather v. United Mine Workers, 711 F.2d 530 (3d Cir. 1983)	15

CASES	PAGE
Iberian Tankers Company v. Gates Construction Corp., 388 F.Supp. 1190 (S.D.N.Y. 1975)	12
Independent Investor League v. Saunders, 64 F.R.D. 564 (E.D. Pa. 1974)	10
In Re Leimer, 724 F.2d 744 (8th Cir. 1984)	10
In Re Nucorp. Energy Securities Litigation, [1983-1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶99, 539, (S.D. Cal. 1983)	10
J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1948)	13
Krolick Contracting Corp. v. Benefits Review Board, 558 F.2d 685 (3d Cir. 1977)	10
Lowry v. Baltimore & Ohio Railroad Co., 707 F.2d 721 (3d Cir.), rehearing denied, 711 F.2d 1207, cert. denied, 464 U.S. 893 (1983)	1,7,8
Marek v. Chesny, __ U.S. __, 105 S. Ct. 3012 (1985)	6,14
Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co., 586 F.Supp. 1297 (W.D. Pa. 1984), aff'd. mem., 760 F.2d 260 (3d Cir. 1985)	1
Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co., 680 F.2d 933 (3d Cir.), cert. denied, 459 U.S. 1056 (1982)	1
Rose v. Arkansas Valley Environmental & Utility Authority, 562 F.Supp 1180 (W.D. Mo. 1983)	10
Tacon v. Arizona, 410 U.S. 351 (1973)	9

Statutes and Rules	Page
Civil Rights Act, 42 U.S.C. §1988 (1982)	14
Federal Rules of Civil Procedure Rule 68	3,12,13,14,15
Rules Enabling Act, 28 U.S.C. §2072 (1982)	12,13,15
Securities Exchange Act of 1934, 15 U.S.C. §78j (b) (1982)	1
Securities Exchange Commission Rules	
17 C.F.R. §240.10b-5 (1985)	1,7,8
17 C.F.R. §240.10b-17(1985)	1

Other Authorities	
C. Wright, Law of Federal Courts (4th ed. 1983)	10
21 C. Wright & A. Miller, Federal Practice and Procedure, 1985 Pocket Part	12

STATEMENT OF THE CASE

These actions arise out of the declaration of a dividend in the stock of a wholly-owned subsidiary by The Baltimore and Ohio Railroad Company ("B&O") on December 13, 1977, which plaintiffs, who are holders of certain convertible debentures of the B&O, contend violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) and Rule 10b-5, 17 C.F.R. §240.10b-5 (1985). Twice before this Court has denied certiorari in these cases and a related case. *Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co.*, 680 F.2d 933 (3d Cir.), *cert. denied*, 459 U. S. 1056 (1982) (sometimes referred to as the "*PTC* cases"); *Lowry v. Baltimore & Ohio Railroad Co.*, 707 F.2d 721 (3d Cir.), *rehearing denied*, 711 F.2d 1207, *cert. denied*, 464 U.S. 893 (1983).

The petition presently before the Court seeks review of a portion of the decision of the United States Court of Appeals for the Third Circuit ("Court of Appeals") affirming the award made to the plaintiffs by the United States District Court for the Western District of Pennsylvania ("District Court"), *Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co.*, 586 F.Supp. 1297 (W.D.Pa. 1984), *aff'd mem.*, 760 F.2d 260 (3d Cir. 1985).

Following a determination of liability under Rule 10b-17, 17 C.F.R. §240.10b-17 (1985), by the Court of Appeals in the *PTC* cases, they were remanded to the District Court for determination of "an appropriate remedy for the violation we have found." *PTC* cases, 680 F.2d at 943.

On remand, the District Court held that plaintiffs were entitled to have the opportunity to convert their debentures and receive the dividend in the stock of the Mid-Allegheny Corporation ("MAC") at issue, plus all

dividends paid on B&O and MAC since December 13, 1977, the date of the dividend declaration, less interest paid on their debentures since that date. Petitioners have raised no objection to this award, but complain of two ancillary aspects of the decision of the Court of Appeals.

I. The Agreement

During the pendency of these suits, in late 1978, when the B&O had resumed paying cash dividends after a long hiatus, the B&O entered into an agreement with the Chase Manhattan Bank, Trustee of the Indenture under which the convertible debentures were issued. That agreement stated, in pertinent part, that the

> holders of the . . . Convertible Debentures who do, or do not convert, such Debentures, in order to collect the . . . cash dividend will be protected by B&O and allowed to participate on a like basis in the settlement, if any, with, or the court judgment, if any, in favor of the plaintiff in the action *Pittsburgh Terminal Corporation vs. The Baltimore & Ohio Railroad Company, et al.* and/or *Monroe Guttmann, Loretta Guttmann, Janet Rees and Evelyn Bittner vs. The Baltimore & Ohio Railroad, et al.* (App. 98a-99a)[1]

---

1. This agreement was subsequently confirmed in an affidavit of corporate counsel for the B&O filed with the District Court:

> In addition, on behalf of the B&O, C&O and Chessie, I have advised Chase that should the plaintiffs in the *Pittsburgh Terminal* and *Guttmann* actions prevail on the merits of their claims at trial or should a settlement of these claims be reached before trial, all holders of debentures as of December 13, 1977, *whether or not they were subsequently converted*, will be permitted to participate in the Court judgment or settlement on the same terms as the plaintiffs. (App. 96a) (emphasis added).

After this agreement with the Indenture Trustee had been reached, the plaintiffs in one of the *PTC* cases filed a motion for class action determination, seeking to represent a class consisting of

> persons who are current owners of the convertible 4½% B&O Debentures, Series A, due January 1, 2010 [hereafter referred to as "debentures"] and who owned the Debentures on December 13, 1977 or who are current owners of B&O common stock obtained through conversion of the Debentures since December 13, 1977 which were acquired prior to that date. (Supp. App. 1b).

This motion for class action determination was denied. Neither in that motion nor in any other motion did plaintiffs ever seek to represent a class consisting of debentureholders who had subsequently sold their debentures.

Following the remand on the issue of the appropriate remedy, the District Court interpreted the B&O's agreement with the Indenture Trustee to require that the relief which it had ordered also be made available to "[t]hose persons who owned debentures on December 13, 1977 and subsequently converted to B&O common stock." (App. 22a). The Court of Appeals affirmed the District Court's interpretation of the agreement. (App. 28a).

II. The Offer of Judgment

On February 12, 1979, well before trial, the defendants made an offer of judgment to the plaintiffs pursuant to Rule 68 of the Federal Rules of Civil Procedure. In that offer of judgment, the defendants proposed to have "judgment to be taken against them by the plaintiffs . . . by affording plaintiffs the opportunity to convert their

B&O convertible 4½% debentures into shares of B&O common stock and receive as a dividend, as of December 13, 1977, the shares of Mid-Allegheny Corporation stock declared payable as a dividend to shareholders of record of B&O common stock on December 13, 1977". (App. 93a). The terms of the offer of judgment were the same as the terms of the award made by the District Court some 5½ years later.

Defendants made no attempt to have the 1979 offer of judgment admitted into evidence before the District Court following the remand for a determination of an appropriate remedy. On appeal from that determination, however, plaintiffs argued that the District Court had abused its discretion in denying them prejudgment interest because, *inter alia*, plaintiffs had been diligent in prosecuting their action. In order to rebut that contention, defendants referred the Court of Appeals to the five-year-old offer of judgment.

Neither in their reply brief on appeal nor in subsequent oral argument did plaintiffs suggest that the Court of Appeals was barred from considering the offer of judgment with respect to the award of prejudgment interest. Rather, plaintiffs argued that their continued litigation of the action provided them with greater relief than that contained in the 1979 offer. In particular, plaintiffs' reply brief argued that their present relief was greater because of the defendants' concession on appeal to register the MAC stock to be awarded.

In order to correct plaintiffs' misstatement with respect to registration of the MAC stock, at oral argument, defendants offered to the Court two letters addressing the registration of the stock proffered in the 1979 offer of judgment. On rebuttal, counsel for plaintiffs responded to defendants' proffer of the letters by stating:

> The defendants have made an offer to this Court to go outside the record and produce certain letters that were exchanged between counsel after the February '79 Offer of Judgment, which, of course, was not filed until the conclusion of this case. *We have no objection to that.* Those letters will conclusively show that I, within ten days, made an inquiry as to whether the stock would be registered, and the defendants refused to answer that. (Supp. App. 2a) (emphasis added).

The Court of Appeals, in affirming the decision of the District Court on the issue of relief held that the District Court had not abused its discretion in not making prejudgment interest part of its award and merely noted that the offer of judgment was a factor which militated against the award of any such interest. (App. 27a-28a).

This Response is being submitted on behalf of the Defendants, The B&O, The Chesapeake and Ohio Railway Company and Chessie System, Inc. (now through merger, CSX Corporation) in opposition to the Petition for Certiorari.

SUMMARY OF ARGUMENT

The issue on appeal to the Court of Appeals was the appropriateness of the relief granted to plaintiffs by the District Court. No challenge is now made to that relief. The only issues raised by the Petition for Certiorari are issues which had never been raised below.

The issue of the right of sellers of debentures to participate in the remedy had been presented solely in the context of the contractual interpretation of an agreement by the B&O to extend relief to certain non-parties. The Court of Appeals ruled against plaintiffs' argument on that issue, and that limited holding does not conflict with any decision of this or any other Court.

After consideration of the equities, the Court of Appeals denied plaintiffs prejudgment interest. That denial, based in part upon the delay brought about by the plaintiffs' refusal to accept an offer of judgment some 5½ years before the award, was not an abuse of discretion. The recent case of *Marek v. Chesny*, ___ U.S. ___, 105 S.Ct. 3012 (1985), cited by plaintiffs, affords plaintiffs no support in that regard.

REASONS FOR DENYING THE WRIT

I. There is No Conflict Presented In This Case on The "Travel" Issue

Petitioners have contended that a conflict exists between the decision of the Court of Appeals in this case on the rights of sellers of debentures to participate in any relief in this case and the decision of the Court of Appeals in *Lowry v. Baltimore & Ohio Railroad Co.*, 707 F.2d 721 (3d Cir.), *rehearing denied*, 711 F.2d 1207, *cert. denied*, 464 U.S. 893 (1983) and certain district court decisions. Such "conflict," however, has been manufactured in a transparent attempt to find some basis to come within this Court's Rule 17 relating to the criteria for the grant of a writ of certiorari. This "conflict" simply cannot stand scrutiny.

The plaintiffs have focused their attention on the *Lowry* case. In that related case, which involves a certified class of plaintiffs, the Court of Appeals was called upon to decide whether purchasers of debentures *after* December 13, 1977, the date of the MAC dividend declaration, were entitled to sue under Rule 10b-5 and for certain state claims. In a *per curiam* opinion and judgment, the *en banc* Court of Appeals dismissed all of the plaintiffs' claims under the federal securities laws. The basis for the judgment was that three judges did not believe that causes of action are automatically assigned to subsequent purchasers of the debentures, and that two of the judges did not believe that Rule 10b-5 had been violated by the actions of the defendants. While dismissing the *Lowry* plaintiffs' federal claims by a 5-3 vote, the Court of Appeals remanded the state claims to the District Court for a determination as to whether those claims can proceed as pendent claims or on the basis of diversity of citizenship. 707 F.2d at 723.

Following the Court of Appeals' decision, the *Lowry* plaintiffs filed a petition for writ of certiorari in this Court. In that petition, docketed at 211 Oct. Term, 1983, the plaintiffs raised the issue of whether causes of action for alleged violations of the federal securities laws "travel" with the securities so that subsequent purchasers of those securities can maintain those causes of action. This Court, on October 11, 1983, denied the writ. 464 U.S. 893. The *Lowry* plaintiffs' state claims are currently pending before the District Court.

In contrast, in the present case, the issue before the District Court on remand was the appropriate relief for a violation of Rule 10b-5. The District Court determined that the appropriate remedy was the opportunity for the plaintiffs to receive the MAC dividend on a *nunc pro tunc* basis. The Court of Appeals affirmed. No objection is now made by the plaintiffs to that relief.

In addition to a determination of the appropriate relief, both the District Court and the Court of Appeals were asked to decide the contractual question[2] of the scope of the agreement which the B&O had entered into with the Indenture Trustee to provide to other debentureholders the same relief as the Court might award to the instant plaintiffs. *See* p. 2, *supra.* As noted by the Court of Appeals, "[t]he actions here were not class actions." (App. 28a). Therefore, any undertaking of the B&O to provide such relief to any party other than the plaintiffs in these cases was purely voluntary and any relief any such persons receive is based on the agreement and not on any action of the plaintiffs.

---

2. Petitioners themselves acknowledge that the issue presented to the Court of Appeals was a "contractual question." Petition for Certiorari at 8.

The plaintiffs, who are not parties to that agreement, had argued on appeal that the agreement should be construed to include debentureholders who had sold their debentures since the date of the MAC dividend declaration. In deciding whether to so extend the remedy under the stipulation, the Court of Appeals emphasized that "[t]his case presents *only* the contractual question of whether the stipulation applies to persons who held B&O debentures on December 13, 1977 but subsequently sold them. We therefore have no occasion to decide whether those persons have a cause of action against B&O." (App. 28a) (emphasis added).

The reason that the Court of Appeals did not have occasion to consider the latter issue is simply because that issue had never been raised. Yet that is the very issue that the plaintiffs now wish to have this Court decide for the first time, contrary to this Court's many decisions that such issues first must be properly raised below. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

Despite the fact that the issue had not been raised, plaintiffs contend that "in the Third Circuit wronged debentureholders who sell their securities cannot obtain relief and subsequent purchasers who buy those securities cannot assert any federal claims for the established securities law violations." Petition for Certiorari at 12-13. This is simply not so. As is obvious from the decision of the Court of Appeals, (App. 28a n.2), it was not in these cases deciding whether sellers of securities, following the sale of their securities, retain any cause of action for violations of the federal securities laws which accrued prior to their sale. Its decision with regard to sellers was simply that

that group of non-parties was not within the language of the B&O's stipulation that " 'all holders of debentures as of December 13, 1977, whether or not they were subsequently converted, would be permitted to participate in the Court judgment or settlement on the same terms as the plaintiffs'." (App. 28a). Furthermore, because of the fact that the Court of Appeals designated that its opinion was "Not for Publication," even this limited contractual interpretation issue will have no precedential value beyond the facts of these and the related cases. *See, e.g., In re Leimer,* 724 F.2d 744, 746 (8th Cir. 1984); *Krolick Contracting Corp. v. Benefits Review Board,* 558 F.2d 685, 689 (3d Cir. 1977). *See also,* C. Wright, *Law of Federal Courts* 724 (4th ed. 1983).

Finally, the district court cases cited by petitioners, *Independent Investor League v. Saunders,* 64 F.R.D. 564 (E.D. Pa. 1974), *Rose v. Arkansas Valley Environmental & Utility Authority,* 562 F.Supp. 1180 (W.D. Mo. 1983), and *In re Nucorp. Energy Securities Litigation,* [1983-1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 99,539 (S.D. Cal. 1983), all involved cases like *Lowry* where subsequent holders of securities attempted to assert causes of action which had accrued prior to their acquisition of the securities. Those cases, like the present,[3] did not involve any claims made by sellers asserting causes of action on securities which they had sold. Thus, they too offer no basis on which a "conflict" can be found to exist.

---

3. The only reference by the plaintiffs in this case in the District Court to the sale of their debentures was in an affidavit submitted on the question of the appropriate remedy. That affidavit, however, makes it clear that the reference was solely in the context of the contractual question: "I have sold some of our debentures . . . in reliance on the Defendants' affidavit that those who held

The same holds true with respect to the subsequent purchaser issue presented in *Lowry.* While the issue of the entitlement of subsequent purchasers to maintain a cause of action was presented in that case and certiorari denied on that issue, because of the mixed nature of the Court of Appeals' decision (3 judges finding travel, 3 judges finding no travel and 2 judges finding no liability), it will have little, if any, precedential value outside of the particular facts of these and the related cases.

II. There is No Conflict Presented In This Case On The Issue Of Prejudgment Interest.

As a threshold matter, this Court's refusal to hear questions not raised or resolved by the lower courts, *Delta Airlines Inc. v. August, supra,* precludes review of the interest issue because of plaintiffs' failure to raise any objection to the Court of Appeals' consideration of the 1979 offer of judgment, as well as plaintiffs' counsel's express concurrence to that Court's consideration of letters relating to the terms of the offer. (Supp. App. 2a).

Moreover, even if plaintiffs had properly raised or preserved the issues they now raise with respect to prejudgment interest, those issues do not present questions of substance sufficient to warrant this Court's review. As with the "travel" issue, the "conflicts" plaintiffs purport to find regarding the denial of prejudgment interest in this case simply do not exist.

---

debentures on December 13, 1977, would be entitled to receive the remedy awarded by the Court . . ." (App. 101a). The Defendants' affidavit referred to is quoted in footnote 1 of this Brief. Plainly, plaintiffs themselves were relying solely on the defendants' affidavit to establish any claims for relief as a seller. That that reliance was misplaced is apparent from the language of the affidavit itself.

More particularly, there is no conflict between Rule 68 of the Federal Rules of Civil Procedure and the Rules Enabling Act, 28 U.S.C. §2072 (1982), on the one hand and the decision of the Court of Appeals on the other. As plaintiffs acknowledge, the offer of judgment was never admitted into evidence before the District Court, never considered by that court in determining to deny plaintiffs prejudgment interest, and consequently was not before the Court of Appeals on that basis. *Cf. Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 n.55 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). Therefore, the bar to admissibility of an offer of judgment into evidence contained in Rule 68 has been observed in this case.

That bar to admissibility, however, did not prevent the Court of Appeals from taking judicial notice of the existence of the offer in determining whether the award of prejudgment interest was appropriate. *Cf.* 21 Wright & Miller, *Federal Practice and Procedure*, 1985 Pocket Part § 5104, n. 6.2. Indeed, the Court of Appeals' consideration of the settlement offer as part of its review of the lower court's discretionary denial of prejudgment interest is fully in accord with the practices of federal courts in this regard. *See, e.g., Iberian Tankers Company v. Gates Construction Corp.*, 388 F.Supp. 1190 (S.D. N.Y. 1975). Similarly, that consideration given the offer of judgment is in accordance with Rule 68's policy objectives of "encourag[ing] settlements and avoid[ing] prolonged litigation." Fed. R. Civ. P. 68, Notes of Advisory Committee. For these reasons, the Court of Appeals' consideration of the offer for the sole purpose of evaluating the propriety of the District Court's denial of prejudgment interest did not violate either the terms or intended purpose of Rule 68.

Plaintiffs' attempt to find a conflict between Rule 68 and the Rules Enabling Act is likewise meritless, most obviously because the action of the Court of Appeals to which plaintiffs now take exception was not action which was indicated or controlled in any respect by Rule 68, and because the Court of Appeals' denial of prejudgment interest in this action involved no substantive right. As this Court has stated, " 'interest is not recovered [in a securities action] according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable'." *Blau v. Lehman*, 368 U.S. 403, 414 (1962).

The equities are opposed to such a surcharge in the instant case. Plaintiffs seek interest on the difference between the net dividends of both B&O and MAC, minus the interest they received on the debentures. However, equity would not require the payment of interest on the difference between the B&O dividends and the interest on the debentures because plaintiffs could have converted their debentures into B&O stock and received the B&O cash dividends at any time during the pendency of these lawsuits. Indeed, plaintiffs acknowledge that many debentureholders have done so with respect to their debentures. (Supp. App. 2c). In accordance with the B&O's agreement with the Indenture Trustee, discussed *supra* at pp. 7-11, those debentureholders who have converted, "will be permitted to participate in the Court judgment or settlement on the same terms as the plaintiffs." (App. 96a), a fact plaintiffs and defendants agree on. (Supp. App. 2c). Because of this equitable factor alone, the Court of Appeals' decision was proper and does not merit this Court's review. *Cf. J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1948).

Finally, plaintiffs have suggested that these cases be remanded in light of this Court's recent decision in *Marek v. Chesny*, ___ U.S. ___, 105 S.Ct. 3012 (1985). Because the situation addressed by this Court in *Marek* is totally distinguishable from the facts of the present actions, that case provides plaintiffs with no support in this regard. Indeed, the only connection between the present cases and *Marek* is that Rule 68 is cited in both.

At issue in *Marek* was the interplay of the cost-shifting provisions of Rule 68 and the statutory provision of Section 1988 of the Civil Rights Act, 42 U.S.C. § 1988 (1982), which grants prevailing plaintiffs attorneys fees as part of their "costs." More particularly, the issue in *Marek* was whether Rule 68's use of the term "costs" adopted the definition of costs under Section 1988. This Court, reading Section 1988 into Rule 68, held that a plaintiff is precluded under Rule 68 from recovering attorneys' fees incurred following an offer of judgment, where he had rejected an offer greater than his ultimate recovery. In light of that ruling, this Court did not reach the issue of the Rules Enabling Act, which had been relied upon in part by the Court of Appeals for the Seventh Circuit in allowing the plaintiff to recover such attorneys' fees. *Chesny v. Marek*, 720 F.2d 474, 479 (7th Cir. 1983). For that reason alone, this Court's decision in *Marek* is irrelevant to the issue at hand.

In the instant case, the Court of Appeals' decision denying plaintiffs' prejudgment interest was not based on the inclusion or exclusion of prejudgment interest as "costs" under Rule 68; and no party to this action has ever suggested otherwise or identified a statute to support such a proposition. It was not Rule 68 that the Court of Appeals relied upon to deny prejudgment interest; rather, it was its determination that it was not inequita-

ble to deny interest where the plaintiffs' "ensuing delay in their receipt of B&O and MAC dividends is attributable to their refusal [of the settlement offer], not to any fault on B&O's part." (App. 28a). Thus, because the denial of prejudgment interest in the instant action did not occur by operation of Rule 68, there can be no conflict in the instant case between that Rule and the Rules Enabling Act.

In short, in the present action, following briefing and argument regarding the fairness of the denial of prejudgment interest under the equitable standards set forth in *Feather v. United Mine Workers*, 711 F.2d 530 (3d Cir. 1983), the Court of Appeals found that the District Court's denial of prejudgment interest did not constitute an abuse of discretion. That determination, of little or no import beyond the confines of the instant action, " 'is [n]either so unfair [n]or so inequitable as to require [this Court] to upset it'." *Blau v. Lamb*, 363 F.2d 507, 528 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) (quoting *Blau v. Lehman*, 368 U.S. 403, 414 (1962)).

CONCLUSION

Based upon the foregoing cases, authorities and arguments, it is respectfully requested that this Honorable Court deny the Writ of Certiorari.

Respectfully submitted,

.....

RICHARD T. WENTLEY
ANTHONY J. BASINSKI
JOSEPH W. KLEIN

REED SMITH SHAW & McCLAY
747 Two Mellon Bank Center
Pittsburgh, PA 15219

(412) 288-3040

Counsel for The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company and Chessie System, Inc.

SUPPLEMENTAL APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PITTSBURGH TERMINAL CORPORATION, ET AL.
Appellants
vs.
THE BALTIMORE & OHIO RAILROAD CO., ET AL.
No. 84-3331

MONROE GUTTMANN, ET AL.,
Appellants
vs.
THE BALTIMORE & OHIO RAILROAD CO., ET AL.
No. 84-3332

United States Courthouse
601 Market Street
Philadelphia, Pennsylvania

January 17, 1985

CORAM:

THE HONORABLE JAMES HUNTER, III, J. *Circuit Judge*

THE HONORABLE A. LEON HIGGINBOTHAM, JR., J. *Circuit Judge*

THE HONORABLE JAMES KELLY, J. *District Judge*

McKINLEY WISE & ASSOCIATES, INC.
Registered Professional Reporters
1211 Chestnut St., Suite 901
Philadelphia, Pa. 19107
(215) 564-2181

Mr. Malakoff: Yes, Your Honor. Thank you.

The defendants have made an offer to this Court to go outside the record and produce certain letters that were exchanged between counsel after the February '79 Offer of Judgment, which, of course, was not filed until the conclusion of this case. We have no objection to that. Those letters will conclusively show that I; within ten days, made an inquiry as to whether that stock would be registered, and the defendants refused to answer that.

The defendants also made one other, I think, gross mistake that should be pointed out before I address the principal argument in this case, and that is that the plaintiffs were interested in converting. In fact, the plaintiffs, in November of '77, wrote the company saying, "If you're going to declare dividends—" the plaintiffs had noticed that the company was building up—the B&O was building up a large cash reserve. And he wrote them and he said, "If you're going to declare dividends, I'd like to know. You haven't declared one in sixteen years."

And the company wrote back that, misleading him into thinking that no dividend would be declared.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER Plaintiffs, vs. THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., Defendants.	Civil Action No. 79-94

SUPPLEMENTAL AND AMENDED MOTION FOR CLASS ACTION DETERMINATION

AND NOW comes the Plaintiffs, Monroe Guttman, Loretta Guttmann, Janet Rees and Evelyn Bittner, individually and on behalf of all other persons similarly situated, by and through their counsel, Berger, Kapetan, Malakoff & Meyers and move this Honorable Court to grant an order pursuant to F.R.Civ.P. 23 (c)(1) determining that this action may properly proceed as a class action pursuant to F.R.Civ.P. 23(a) and 23(b)(1)(A), 23(b)(1)(B) and/or 23 (b)(3) for a class of persons who are current owners of the convertible 4½% B&O Debentures Series A, due January 1, 2010 [hereafter referred to as "debentures"] and who owned the debentures on December 13, 1977 or who are current owners of B&O common stock obtained through conversion of the debentures since December 13, 1977 which were acquired prior to that date.

BERGER, KAPETAN, MALAKOFF & MEYERS, P.C.
By: Michael P. Malakoff
Attorneys for the Representative and Class Plaintiffs

DATED: January 17, 1980.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PITTSBURGH TERMINAL CORPORATION, Plaintiff vs. THE BALTIMORE & OHIO RAILROAD CO., ET AL. Defendants	Civil Action No. 77-1455
MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER, Plaintiffs vs. THE BALTIMORE & OHIO RAILROAD CO., ET AL.	Civil Action No. 79.94

AFFIDAVIT OF MONROE GUTTMANN

(c) MAC's interests have been subordinated to the benefit of its parent CSX and CSX affiliated companies without apparent consideration.

(d) MAC's operations have been cloaked in secrecy along with financial accounting which has been inadequate and, on occasion, erroneous, with no outside public auditing to protect my interest as a minority holder.

V. STATUS OF OTHER CONVERTIBLE DEBENTURE HOLDERS

19. The annual reports of B&O since 1977 show that of 13,202 Series A Convertible Debentures outstanding on December 31, 1977, there have been conversions into B&O common stock as follows:

Year	*Debentures Converted*	*Shares of B&O Common Issued*
1978	198	1,980
1979	2,013	20,130
1980	593	5,931
1981	831	8,310
1982	759	7,590
TOTALS	4,394	43,941

An unknown number of those former debentureholders held their debentures on December 13, 1977 and will be entitled to participate in any remedy awarded by this Court.